Supreme Court, U.S.
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No. 92-57

Supreme Court of the United States

October Term, 1991

CORNELL UNIVERSITY,

Petitioner,

v.

RUSK COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether a State property taxation scheme that results in the taking of a severed fee simple interest in minerals based upon the failure of a separate and distinct surface fee simple holder to pay real property taxes assessed to the surface fee violates the due process clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of the case.[1]

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[1] *Cornell University has no parent corporation nor does it have any subsidiaries other than those wholly owned by Cornell University.*

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OFFICIAL REPORTS

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JURISDICTIONAL STATEMENT

The Wisconsin Court of Appeals decision was entered January 14, 1992. The Wisconsin Supreme Court denied discretionary review on April 7, 1992. 28 U.S.C. §1257 gives this Court jurisdiction because the issue presented draws into question the validity of statutes of the State of Wisconsin on the grounds of their being repugnant to the Constitution of the United States. 28 U.S.C. §2403(b) may be applicable.

CONSTITUTIONAL PROVISIONS, STATUTES AND ATTORNEY GENERAL OPINIONS INVOLVED

United States Constitutional Amendment XIV, §1:

". . . nor shall any state deprive any person life, liberty, or property, without due process of law;"

The following are printed in the Appendix:

Wis. Stats. § 70.17

Wis. Stats. § 70.32

Wis. Stats. § 75.14

Wis. Stats. § 70.47

Wis. Stats. § 74.57

Wis. Stats. § 75.12

Wis. Stats. § 706.01(7m)

Wis. Stats. § 706.057

74 Op. Att'y Gen. 59 (1985)

STATEMENT OF THE CASE

A. RAISING OF THE FEDERAL QUESTION IN THE TRIAL COURT, THE WISCONSIN COURT OF APPEALS AND THE WISCONSIN SUPREME COURT

In Petitioner's Brief in Support of its Motion for Summary Judgment, pages 11-18, (App. pp. 120-134), Petitioner challenged as repugnant to the Constitution of the United States the statutory scheme created by §§70.17, 70.32 and 75.14, Wis. Stats., in relation to the property rights created by §§706.01(7m), 706.057, Wis. Stats., in the event that the trial Court found that the issuance of a tax deed upon the failure of a surface fee simple holder to pay real property taxes assessed to the surface fee resulted in the extinguishment of the rights of a holder of a fee simple interest in severed mineral rights. The trial court found that the issuance of a tax deed did

not operate to extinguish the severed fee simple interest and that if it did, the extinguishment would be unconstitutional under the due process clause of the United States Constitution.

On Appeal in the Wisconsin Court of Appeals, Petitioner argued in its Brief, pages 15-23, (App. pp. 135-158) that in the event that the issuance of a tax deed based upon the failure of the surface fee simple holder to pay real property taxes extinguished the severed fee simple interest in minerals, the scheme that allowed such an extinguishment violated Fourteenth Amendment guarantees of due process.

The Wisconsin Court of Appeals held that the issuance of a tax deed based upon failure of the surface fee simple holder to pay real property taxes assessed to the surface fee did, in fact, extinguish severed fee simple interests in minerals. The

Wisconsin Court of Appeals decided the merits of both the substantive and procedural due process arguments at pages 11 through 17 of its decision (App. pp. 11-17).

In Petitioner's request for discretionary review by the Wisconsin Supreme Court, Petitioner once again raised the Fourteenth Amendment due process issue at pages 14-18 of that request (App. pp. 156-165). The Wisconsin Supreme Court refused discretionary appeal.

B. FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED.

The facts in this case are undisputed. App. 3. Cornell University is a "land grant" university. In 1866, Ezra Cornell acquired more than one-half million acres of land in northern Wisconsin to make up the "land grant" for Cornell University. Land grants were a part of a federal program to

fund new colleges. The northern Wisconsin land acquired by Mr. Cornell became an asset of Cornell University through the federal program.

In 1897, Cornell University sold its surface fee simple interests in the northern Wisconsin acreage for Six Million Dollars ($6,000,000.00). At that time, Cornell University reserved and retained a one-half undivided fee simple interest in the mineral rights to the land. App. 38. The Six Million Dollars ($6,000,000.00) and the retained mineral rights became the initial assets of the Cornell University Endowment Fund.

On April 30, 1987, Cornell University filed a Statement of Mineral Claim in the

Rusk County Register of Deeds Office pursuant to §706.057, Wis. Stats.[2]

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[2]*The current statutory scheme for the regulation of severed interests in minerals was enacted by the Wisconsin legislature in 1983. It replaced the previous system that was declared constitutionally repugnant by the Wisconsin Supreme Court in Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis.2d 566, 571, 259 N.W.2d 316 (1977). In Pedersen, the Wisconsin Supreme Court relied upon this Courts's conclusion from Elder v. Wood, 208 U.S. 226, 232, 28 S.Ct. 263 (1908) that severed mineral interests are property worthy of constitutional protection because "[they are] distinct from the land, vendible, inheritable and taxable." Id. As a result of the change in the statutory scheme, Cornell University was required to, and in fact did, register its mineral rights*

App. 37. That Statement of Mineral Claim related to more than 40,000 acres in Rusk County. App. 37. Cornell University's severed fee simple mineral interests in Rusk County have never been assigned a separate assessed value for real property tax purposes nor have any real property taxes been levied on Cornell University's severed fee simple mineral interests. App. 39. Cornell University has not, to date, made any profit on the mineral rights it owns in Rusk County.

One of the Rusk County parcels in which Cornell University holds a severed one-half undivided fee simple interest in minerals is

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claims in fourteen different Wisconsin Counties' register of deeds offices. Cornell's currently holds registered fee simple mineral interests in 274,940 acres of land in Wisconsin.

a 160 acre parcel that the current surface fee simple interest holder uses for farming (the "Parcel"). App. 3. The surface fee simple holder failed to pay real property taxes on the Parcel for 1985, 1986, 1987, 1988 and 1989. App. 4. On October 21, 1986, as a result of the failure of the surface fee simple holder to pay 1985 real property taxes on the Parcel, the Rusk County Clerk issued a Tax Certificate to Rusk County pursuant to §74.46, Wis. Stats. App. 4. Under the relevant tax delinquency statutes, Rusk County would be entitled to obtain a Deed of Conveyance three (3) years after the issuance of the Tax Certificate. App. 4.

On December 29, 1989, pursuant to §75.12, Wis. Stats., Rusk County issued a written Notice of Application for Issuance of Tax Deed (the "Notice"). App. 4. Under the Wisconsin Statutes, a Tax Deed could be

issued to Rusk County ninety (90) days after the Notice. App. 40. Cornell University first obtained notice of the Tax Delinquency proceeding upon receipt of the Notice in January, 1990. App. 39. On March 26, 1990, Cornell University commenced an action against Rusk County seeking declaratory and injunctive relief related to the effect of the issuance of a Tax Deed upon Cornell University's retained fee simple interest in the Parcel's minerals. App. 5. That action sought temporary injunctive relief precluding the issuance of a Tax Deed until the matter could be fully litigated. App. 5. The surface fee simple owner of the Parcel paid the 1985 taxes prior to the issuance of a Tax Deed. App. 5. Thus, the urgent need for injunctive relief was eliminated. App. 5.

Tax Certificates for the Parcel have been issued to Rusk County based upon the

surface fee simple holder's delinquent 1986, 1987 and 1988 real estate taxes. App. 5. Therefore, the declaratory judgment aspect of the claim proceeded as Rusk County intends to obtain Tax Deeds pursuant to the tax delinquency statutes if these remaining delinquent taxes are not paid within the applicable time period. App. 5.

On April 12, 1990, Rusk County filed an Answer which admitted the operative factual pleadings contained in Cornell University's Complaint but denied the allegations related to the legal impact of the facts alleged. Rusk County, through its pleading, agreed with Cornell University that there is a "present controversy with respect to whether or not mineral interests which have been separated from surface rights . . . are extinguished upon the failure of the surface interest holder to pay real property taxes as assessed and levied by Rusk County."

A Motion for Summary Judgment was heard on October 29, 1990. App. 44. Judge Frederick Henderson, in granting Summary Judgment in favor of Cornell, ruled:

(1) "I have to conclude from [§706.01 (7m), Wis. Stats.] that at least in Wisconsin an interest in minerals that is separate from the fee simple interest in the surface rights on a parcel of land where minerals exist is real property;" and

(2) "I think that once you find, and I don't know how we cannot find this interest in minerals is real property, real estate just as the surface rights are, then you have got a taxation system right in place. It's the same one that they tax surface rights with, and I'm satisfied that the statutes in

Wisconsin recognize that severed interests in minerals gives the owner of that interest the ownership of those minerals in fee simple. So it's the same thing as owning the surface rights. They're both real property."

App. 45, 49-50. Written Findings of Fact, Conclusions of Law and a Judgment were entered on December 10, 1990. App. 36-43.

The Conclusions of Law provided, in part:

1. Severed mineral interests "are subject to separate taxation under Section 70.32, Wis. Stats.;"

2. "The fact that a surface owner may be in default of his/her property tax obligation does not defeat or affect the fee of the owner of the interest in minerals beneath the surface. To rule otherwise

could constitute a violation of constitutional protection."

App. 42, 42-43.

Rusk County filed a notice of appeal on March 7, 1991. On January 14, 1992, the Court of Appeals reversed, holding that while severed interests in minerals were "real property," the tax system of Wisconsin constitutionally allowed for only one type of real property tax, that being of the surface fee simple holder, even if that individual did not own the mineral interests upon which he or she was being taxed. App. 1. As a result, the Court of Appeals held that if the surface fee simple holder failed to pay real property taxes when due the severed fee simple mineral interest holder would forfeit his or her fee simple property interest when a tax deed to the surface fee issued. Id.

On February 13, 1992, Cornell petitioned the Wisconsin Supreme Court for discretionary review. App. 156-165. That petition was denied on April 7, 1992. App. 52.

ARGUMENT

WISCONSIN'S REAL PROPERTY TAX COLLECTION SCHEME, WHICH HAS BEEN INTERPRETED BY WISCONSIN COURTS TO INCLUDE THE "TAKING" THROUGH THE ISSUANCE OF A TAX DEED, OF SEVERED FEE SIMPLE OWNERSHIP IN MINERAL INTERESTS BASED UPON THE FAILURE OF THE SURFACE FEE SIMPLE HOLDER TO PAY REAL PROPERTY TAXES ASSESSED TO THE SURFACE FEE, IS REPUGNANT OF THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE.

It has long been the rule of this Court:

> [T]hat the Fourteenth Amendment does not in terms or effect

> prohibit unwise taxes, merely because they are unwise, or unfair or burdensome taxes, merely because they are unfair or burdensome. The wisdom or fairness of the tax before us are not matters subject to our control or revision. We are only concerned with the power of the state to lay the tax.

Harvester Co. v. Wisconsin Dept. of Taxation, 322 U.S. 435, 444, 64 S.Ct. 1060 (1944). States can, therefore, tax to the full extent of their "sovereign power" without being subject to judicial review by this Court. Id., at 445. However, when a State exceeds its sovereign power and interfere with an individual's constitutionally protected right, that exercise of State power is subject to review by this Court.

In determining whether a tax is within a State's constitutional power, this Court looks to the incidence of the tax and its practical operation, and not to its characterization by state courts. Harvester Co., at 441, citing, Schaffer v. Carter, 252 U.S. 37, 55, 40 S.Ct. 221 (1919). In this case it is not the incidence of the tax that is at issue but rather the practical operation of the delinquent tax collection system. The Wisconsin Courts have fulfilled their duty and have defined the operation of the statutes of which they are the final arbiter. In doing so they have created a practical operation that results in the "taking" of a property right from one who has no means to protect his or her right other than through the payment of taxes on property that he or she does not own. The extinguishment of the severed fee simple mineral interests that results from a

failure of the surface fee simple owner to pay real property tax is a "taking" that is repugnant to the United States Constitution.

The Wisconsin Courts have completely ignored the practical operation of the statutory scheme they interpreted. The constitutional repugnancy created by the action of the Wisconsin Courts can only be cured by review in this Court.

The question presented by this case was one of first impression in Wisconsin.[3]

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[3]*Cases from other state jurisdictions related to the issue presented are not particularly helpful. The cases from other state courts that hold that mineral interests were not transferred by the operation of a tax deed were decided on bases other than the constitutional issue raised here. For example, in* Walker v. Hoffman, *405 P.2d 57 (Okla. 1965), the tax*

deed was held not to divest the mineral interest holder of his interest because proper notice had not been provided to the interest-holder. Likewise, in Huffman v. Henderson, 42 S.W.2d 221, 222 (Ark. 1931), and in Addison v. Goodin, 731 P.2d 391, n. 12 (Okla. 1987), while courts in both Arkansas and Oklahoma found that the issuance of a tax deed did not extinguish severed mineral interests, the decisions were based upon statutory construction rather than constitutional grounds. Finally, in Nevada Irrigation District v. Keystone Copper Corp., 224 Cal.App.2d 523, 36 Cal.Rptr. 775 (Ct. App. 1964), and Mitchell v. Espinosa, 243 P.2d 412 (Colo. 1952), the state courts of Colorado and California decided that a tax deed did not extinguish severed mineral interests based upon equitable principles rather than

There are no published cases in any United States Court of Appeal that address the

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constitutional grounds.

Only two state courts other than Wisconsin have held that severed mineral interests are extinguished by a tax deed issued with respect to the surface fee. The first court, Missouri, did not discuss the constitutional issue raised in this case. See Dorman v. Minnich, 336 S.W.2d 500 (Mo. 1960).

The second state court, Oklahoma, was the only state court other than Wisconsin to reach the constitutional issue presented in this case. See Cornelius v. Jackson, 209 P.2d 166 (Okla. 1948), appeal dismissed, 335 U.S. 906, 69 S.Ct. 412 (1949). The Cornelius case is no longer viable authority because of a statutory change that had the effect of overruling the Cornelius decision.

question presented. Only one decision of this Court comes close to the issue presented. In Downman v. State of Texas, 231 U.S. 353, 357, 34 S.Ct. 52 (1913), this Court considered whether a real property taxation system that provided for the separate assessment and taxation of severed fee simple interests in minerals was constitutional. This Court held that such a system was constitutional. The Court reasoned that if such a system did not exist that a surface fee holder would be subject to the payment of taxes on property that he or she did not own. The constitutional challenge in the Downman case came from a severed fee simple mineral interest holder claiming that since as a matter of fact the severed mineral interests had been assessed to the surface fee that a tax deed could not be issued with respect to unpaid real property taxes levied against the severed

mineral interests. This Court held that simply because the surface fee simple owner may have paid taxes that he or she did not owe did not provide the basis for the severed fee simple owner to avoid taxes properly levied upon his property. Id., at 357.

In Downman, this Court was not presented with a claim of wrongful taxation or taking related a severed fee simple interest in minerals as a result of the surface fee simple holder's failure to pay taxes. However, the result urged by Cornell in this case is the only logical conclusion to be drawn from the reasoning of the Downman decision.

The constitutional result urged by Cornell in this case and foreshadowed by this Court in the Downman case was adopted by the only United States Court that has addressed the direct issue presented in this

case. Lien v. Simons, 522 F. Supp. 712 (D. Mont. 1981), rev'd on other grounds, 698 F.2d 1230 (9th Cir. 1982).[4] The District Court in Lien examined whether a tax deed, which issued as the result of the surface fee holder's failure to pay real property taxes, conveyed mineral rights subject to a prior reservation by deed.[5] The Lien court reasoned, contrary to the Wisconsin Court of Appeals, that the tax deed could not convey the mineral rights since it represented a foreclosure only on the surface estate which came about because of a failure by the surface fee simple holder to pay taxes on

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[4]*The Ninth Circuit reversal of the Lien was an unpublished decision. The text of the unpublished decision in found in the appendix at pages App. 166-173.*

[5]*In Montana, mineral rights are not taxed.*

the surface estate. The District Court held:

> The grantor who has reserved a mineral estate . . . cannot be stripped of title due to a surface owner's failure to pay taxes.

Id., at 717.

The Court reasoned:

> To make the title of the Grantor who reserves a mineral estate contingent upon the Grantee's timely payment of taxes is the equivalent of deprivation of due process of law and amounts to taking without just compensation.

Id., at 717.[6]

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[6]*The Wisconsin Court of Appeals simply chose to ignore this case essentially holding that Montana is not Wisconsin and therefore the Lien case is of no*

The constitutional conclusion reached by the District Court in the Lien case is the only logical result. In order for the State to "take" severed mineral interests, the State must either compensate for the "taking" or take the severed mineral interests based upon the failure of the holder of such mineral interests to pay taxes on those rights. The "taking" of severed mineral rights based upon the failure of another who is beyond the control of the mineral interest holder is what makes Wisconsin's tax deed scheme, as interpreted by the Wisconsin Courts, constitutionally repugnant.

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precedential value. That decision is another example of the lower court's absolute refusal to consider the practical implications of the taxation scheme.

Severed mineral interests are, for constitutional purposes, the functional equivalent of, for example, an easement appurtenant. Under the Wisconsin Supreme Court's analysis of the United States Constitution, an easement appurtenant cannot be extinguished by a tax deed issued with respect to the failure of the servient estate to pay taxes. Doherty v. Rice, 240 Wis. 389, 3 N.W.2d 734 (1942). The rationale used by the Wisconsin Court to reach that result was its conclusion that if the real property right of the holder of the dominant estate were to lose his or her interest based upon the failure of the servient estate to pay real property taxes the result would be an unconstitutional taking. Id., at 400.

The Doherty court reasoned:

The tax deed only cut off the interests in the land that were

taxed against it. The interests in the land under the restrictions not having been taxed against the land, but against the lands to which they were appurtenant, were not cut off. The tax deed left those interests unaffected and conveyed the land subject to them.

Id., at 402.

"[I]f the easement were cut off by tax sale of the servient estate the owner of the dominant estate would be deprived of his property without due process."

Id., at 400.

In spite of what Cornell views as a rather obvious result compelled by the above-cited authority, the Wisconsin Court of Appeals came to the conclusion that the taking was constitutionally sound. The rationale advanced by the Wisconsin Court to

support that result is that the severed fee simple mineral interests are required by the Wisconsin Constitution and the existing taxation statutes to be assessed and taxed to the surface fee holder.[7] Even if that

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[7] *The Wisconsin Court of Appeals' conclusion that severed fee simple mineral interests would be taxed to the surface estate under the operation of the real estate assessment statutes is wrong. That conclusion, which is dicta, is of equal constitutional repugnancy to the issue presented in this case. The Wisconsin statutes only allow real estate assessments based upon the value that a given property has on the open market. See, §70.32, Wis. Stats.;* Darcel v. Manitowoc Review Bd., *137 Wis.2d 623, 405 N.W.2d 344 (1987). All parcels with severed mineral interests will be of less value than similar parcels that*

do not have severed mineral interests. The practical operation of the Wisconsin Court's interpreted taxation scheme would be to subject the surface fee holder to loss of his or her real property if he or she refused to pay taxes upon real property that he or she did not own, in this case, severed fee simple mineral interests. The resultant taking would be an unconstitutional deprivation without due process. The surface fee holder, under Wisconsin law, has constitutional due process protections from that unjust result. The surface fee holder is entitled to challenge the real property tax assessment on an annual basis. See §70.47, Wis. Stats. A legitimate objection to such an assessment would be that value was improperly added to a property based upon mineral interests which have been severed from the property. That value would

never be attributable to the sale of the surface fee. Such value would have to be subtracted from an assessment through the Board of Review proceedings. The practical result of the operation of the Board of Review statutes is to create, absent separate assessment and taxation, the functional equivalent in Wisconsin of Montana's rule that severed mineral interests are not subject to tax.

The severed fee simple mineral interest holder has no procedural protection. Since the severed fee simple mineral interest holder's property is not assessed, he or she cannot appear before the Board of Review. Since the surface fee simple holder will have already failed to pay the applicable taxes prior to the issuance of the notice for the issuance of a tax deed, any procedural challenge that the severed fee

is functionality true, the rationale advanced simply does not justify the resultant taking or cure the constitutional repugnancy of the taking. This Court is without power to change the interpretation of the operational effect of the Wisconsin Constitution or tax statutes created by judicial review in Wisconsin. However, this Court should cure the unconstitutional taking that results from the practical operation of the delinquent real estate tax collection scheme of Wisconsin. The only mechanism to cure this constitutional repugnancy is through the grant of Certiorari in this case.

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simple mineral interest holder would have at that point would be substantively meaningless. If the surface fee taxes are not paid the property will be forfeited.

There is no constitutionally significant distinction between the Downman, Lien and Doherty cases and the instant dispute. If a severed fee simple property right is capable of separate taxation and is either taxed or not taxed, the severed right whether it be an easement appurtenant or mineral rights cannot be constitutionally "taken" based upon the failure of the surface fee holder to pay taxes assessed to the surface fee.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the United States Supreme Court grant its petition for a Writ of Certiorari to the Wisconsin Court of Appeals.

Dated this 28 day of July, 1992.

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